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Court Rejects Secretary's Denial of Exhausted Benefit Days in the DSH Medicaid Proxy

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As part of the ongoing battle between the Secretary of Health and Human Services and the hospital community, the United States District Court for the District of Columbia has sided with the hospitals. At issue was whether days attributable to a patient who was eligible for both Medicare and Medicaid (dual-eligible) but who had exhausted all of his Medicare hospital coverage (exhausted benefit days) should be counted in the Medicare or the Medicaid fraction of the disproportionate share (DSH) adjustment. The provider maintained that for the days in question the patient had not been entitled to benefits under Medicare Part A and that the days, therefore, were properly included in the Medicaid fraction. The Secretary, however, acting through CMS, took the position that it is the status of the patients, as opposed to the payment for the specific days, that determines whether a patient day is included in the numerator of the Medicaid proxy. The court sided with the provider. *Columbia St. Mary's Hosp. Milwaukee, Inc. v. Sebelius*, Case No. 09-2031 (DDC, Oct. 4, 2012) [PDF].

In its ruling, the court followed much of the logic set forth in the D.C. Circuit's Northeast Hosp. Corp. v. Sebelius, 657 F.3d 1 (DDC, 2012) opinion. In that case, the court of appeals ruled that the Secretary's policy of excluding Medicare Part C enrollees from the numerator of the Medicaid fraction and, instead, including them in the Medicare fraction was in error. Applying the first prong of the time honored *Chevron* analysis, the *Northeast* court ruled that the Secretary's interpretation was arguably permissible under the Medicare statute. The court of appeals nevertheless did not go on to resolve the issue under the second prong of *Chevron* (whether the interpretation by the Secretary was reasonable) because it found that the Secretary's policy was impermissibly retroactive. Similarly, in the *Columbia St. Mary's* case, the district court concluded that, although the Secretary's

interpretation is not foreclosed by the statute's language, it was impermissibly applied retroactively to the hospital's 1999 DSH calculation. The court ruled that prior to 2000, the agency's practice was that of including dual eligible unpaid Medicare days in the Medicaid numerator. The Secretary changed that policy in a decision issued in 2000, which she then formalized in a 2004 rule change. But certainly prior to 2000, the agency's policy was to allow these days. Therefore, the court concluded, the Secretary's decision could not stand.

Ober|Kaler's Comments

The various DSH issues will continue to be a source of conflict, particularly for years after 2000, in the case of exhausted benefit days, and after 2004, in the case of Medicare Part C days. Hospitals and the Secretary will continue to battle over whether the Secretary's interpretation, although a permissible construction of the statute, is reasonable under the Chevron step 2 analysis. In the meantime, providers should continue to preserve their appeal rights by claiming the days as part of the numerator of the DSH Medicaid fraction.